82-898

No._____

Office - Supreme Court, U.S.
FILED
NOV 30 1982
ALEXANDER L. STEVAS.
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION, et al.,

Appellees,

v.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF APPELLANT MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

WARREN SPANNAUS
Attorney General
DONALD J. MUETING
Counsel of Record
Special Assistant
Attorney General
515 Transportation Bldg.
St. Paul, MN 55155
(612) 296-3369
SHEILA S. FISHMAN
Special Assistant
Attorney General
1100 Bremer Tower
Seventh Place & Minnesota St.
St. Paul, MN 55101
(612) 296-3701

November 30, 1982

224-7633 — Banner Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7633

QUESTION PRESENTED

The Minnesota Public Employment Labor Relations Act, Minn. Stat. §§ 179.61-179.76 (1980) (PELRA) provides that a public employer meet and confer with the exclusive representative of each of its professional employee bargaining units to discuss policies and other matters relating to their employment that are not terms and conditions of employment. This meet and confer process is distinguishable from the collective bargaining process which involves the formal negotiations of terms and conditions of employment. Faculty members at the Minnesota community colleges are professional employees who are represented by the Minnesota Community College Faculty Association (MCCFA). The Appellees, plaintiffs below, are community college faculty members who are represented by but are not members of the MCCFA. The community colleges are under the jurisdiction of the Appellant, Minnesota State Board for Community Colleges (MSBCC), a state agency subject to the provisions of PELRA. The question presented in this appeal is whether the First Amendment interests of Appellees are impermissibly infringed under the provisions of PELRA, Minn. Stat. §§ 179.66, subd. 7 and 179.73, subd. 2 (1980), and under the collective bargaining contract if the exclusive representative has sole authority to select representatives for participation in the meet and confer process and where the exclusive representative's practice has been to appoint only its members to its meet and confer committees.

PARTIES TO THE PROCEEDING

The caption of this case which contains the names of all parties to the proceeding before the three-judge United States District Court whose judgment on the above-stated question Appellants seek to have reviewed is as follows:

Leon W. Knight, Morgan Kjer, Donald A. Dahlin, James D. Wallace, Terrence D. Florin, William B. Bauman, Harold J. Gardner, Thomas J. Patin, Eugene D. Mielke, Dr. Richard A. Thompson, David R. Grout, Joan M. Farkas, Gary Lee Nelson, Ronald Lievense, Lucille Johnson, Virginia E. Lanegran, Max A. Malmquist, Ralph G. Powell, Richard D. Isenhart, Cresston Gackel, Plaintiffs.

v.

Minnesota Community College Faculty Association; Minnesota Education Association; Independent Minnesota Political Action Committee for Education; National Education Association; James A. Norman, individually and in his former official capacity as President, Minnesota Community College Faculty Association; James K. Durham, individually and in his official capacity as Vice President, Minnesota Community College Faculty Association; Robert Bell, individually and in his official capacity as Secretary, Minnesota Community College Faculty Association; Calvin Minke, individually and in his official capacity as Treasurer, Minnesota Community College Faculty Association; Ralph S. Chesebrough, individually and in his official capacity as Executive Secretary, Minnesota Community College Faculty Association; Donald Holman, individually and in his official capacity as Minnesota Education Association Representative, Minnesota

Community College Faculty Association; William M. Mondale, individually and in his former official capacity as President, Minnesota Education Association; James Rosasco, individually and in his former official capacity as President, 1973-1974, Minnesota Education Association; Alfred F. Provo, individually and in his former official capacity as Treasurer, Minnesota Education Association; Albert L. Gallop, individually and in his official capacity as Executive Director, Minnesota Education Association; Fulton B. Klinkerfues, individually and in his former official capacity as President, Independent Minnesota Political Action Committee for Education; Janet R. Morgan, individually and in her former official capacity as Vice President, Independent Minnesota Political Action Committee for Education; John W. Schutt, individually and in his official capacity as Treasurer, Independent Minnesota Political Action Committee for Education; James A. Harris, individually and in his former official capacity as President, National Education Association; Helen D. Wise, individually and in her former official capacity as President, 1973-74, National Education Association; Catherine O'C. Barrett, individually and in her former official capacity as President, 1972-1973, National Education Association; Terry E. Herndon, individually and in his official capacity as Executive Secretary, National Education Association; Sam E. Lambert, individually and in his former official capacity as Executive Secretary, 1972-1973, National Education Association; Raymond Crippen, Rosemary McVay, John Sontorovich, Hugh V. Plunkett III, Arleene Nycklemoe, Douglas Alan Bruce, Ronald H. Denison, Edward G. Ziegler, Val Bjornson, Charles Swanson, in-

dividually; Phillip C. Helland, individually and in his official capacity as Chancellor of the Minnesota Community Colleges; John F. Helling, individually and in his official capacity as President, North Hennepin Community College; Dale A. Lorenz, individually and in his official capacity as President, Normandale Community College; Neil Christenson, in his official capacity as President, Anoka-Ramsey Community College; Wayne S. Burggraaff, in his official capacity as Minnesota Commissioner of Finance; James Lord, in his official capacity as Minnesota State Treasurer; Peter Obermeyer, in his official capacity as Director of the Minnesota State Bureau of Mediation Services; Willard H. McGuire, in his official capacity as President, National Education Association; Roger Johnson, in his official capacity as Chairman, Independent Minnesota Political Action Committee for Education; Donald C. Hill, in his official capacity as President, Minnesota Education Association, Toyse Kyle, Elma Ponto, Joseph Norquist, Nadine Chase, Paul Brinkman, in their official capacities as members of the Minnesota State Board for Community Colleges, Defendants.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties To The Proceeding	ii
Table Of Authorities	vi
Opinions Below	1
Jurisdiction	2
Constitutional Provisions, Statutes	2
Statement Of The Case	4
Substantiality Of Question	8
A. Faculty Members Of A Public Educational Institution Do Not Have A First Amendment Right To Meet And Confer With Their Employer Or Its Administrators	9
B. The First Amendment Does Not Require That An Academic Forum Be Provided For The Speech Interest Of Each College Faculty Member	12
C. Speech Involved In Meet And Confer Sessions Is Not Included Under Principles Of Academic Freedom	14
D. Restricting Meet And Confer Rights To The Exclusive Representative Serves A Significant Governmental Interest	17
Conclusion	19

TABLE OF AUTHORITIES

Page

Cases:

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 10, 11, 12, 16, 17, 18, 19

City of Madison v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 10, 12, 13, 15, 16, 19

Clifford v. Moritz,
472 F. Supp. 1094 (S.D. Ohio 1979) 10

Connecticut State Federation of Teachers v. Board of Education Members,
538 F.2d 471 (2nd Cir. 1976) 13, 14, 15, 17

Hanover Township Federation of Teachers, Local 1954 v. Hanover Community School Corp.,
457 F.2d 456 (7th Cir. 1972) 10, 11

Henrico Professional Fire Fighters v. Board of Supervisors of Henrico County,
649 F.2d 237 (4th Cir. 1981) 10

Johnson v. Board of Regents,
377 F. Supp. 227 (W.D.Wis. 1974) 10

Keyishian v. Board of Regents,
385 U.S. 589 (1967) 14, 15

Pickering v. Board of Education,
391 U.S. 563 (1968) 16

Regents of the University of California v. Bakke,
438 U.S. 265 (1978) 14

Reid v. Barrett,
467 F. Supp. 124 (D.N.J. 1979) 13, 15

Shelton v. Tucker,
364 U.S. 479 (1960) 15

Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979) 9, 10

Page

Sweezy v. New Hampshire,
354 U.S. 234 (1957) 14, 15
Widmar v. Vincent,
102 S.Ct. 269 (1981) 13
Winston-Salem/Forsyth County Unit of North Carolina Association of Educators v. Phillips,
381 F. Supp. 644 (M.D. No. Car. 1974) 13

Minnesota Statutes:

Minn. Laws 1982, ch. 568, § 2 ..... 3, 4
Minn. Stat. § 179.61 (1980) 7
Minn. Stat. § 179.63, subd. 15 (1980) 5
Minn. Stat. § 179.63, subd. 18 (1980) 5
Minn. Stat. § 179.65, subd. 1 (1980) 13
Minn. Stat. § 179.66, subd. 3 (1980) 5
Minn. Stat. § 179.66, subd. 7 (1980) ..... i, 3, 5
Minn. Stat. § 179.69, subd. 1 (1980) 5
Minn. Stat. § 179.73, subd. 1 (1980) 18
Minn. Stat. § 179.73, subd. 2 (1980) ..... i, 18
Minn. Stat. § 179.76, subd. 7 (1980) 18
Minn. Stat. §§ 179.61-179.76 (1980) ..... i, 4, 5

Federal Statutes:

28 U.S.C. § 1253 2
28 U.S.C. § 2281 2
28 U.S.C. § 2284 2

United States Constitution:

First Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

No._____

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES,

Appellant,

and

MINNESOTA COMMUNITY COLLEGE FACULTY ASSOCIATION, MINNESOTA EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION, et al.,

Appellees,

v.

LEON W. KNIGHT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF APPELLANT MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES

OPINION BELOW

The opinion of the three-judge United States District Court has not been officially reported. It is set forth in the Appendix at p. A-7. The District Court's Findings of Fact are set forth in the Appendix at p. A-32.

JURISDICTION

The Minnesota State Board for Community Colleges appeals from the judgment entered on March 31, 1982 of a three-judge United States District Court convened pursuant to 28 U.S.C. §§ 2281, 2284. Post-trial motions for relief from judgment, for a new trial, to alter or amend the judgment, and for a hearing on an award of attorneys' fees were denied by the Court on August 13, 1982. Appendix at p. A-1. The Court granted Appellees (plaintiffs below) declaratory and injunctive relief from those Minnesota statutes and corresponding provisions in a collective bargaining contract which the Court held violated plaintiffs' First Amendment rights. The Court ruled that insofar as PELRA is applied to permit the MCCFA exclusive control over which faculty members serve on its meet and confer committees, it has a chilling effect on Appellees' associational and speech interests and is not supported by compelling state interests. Memorandum Opinion and Order, Appendix at p. 17.

A notice of appeal to this Court was filed in the United States District Court, District of Minnesota, Fourth Division, on October 1, 1982. Appendix at p. A-82.

This appeal is being docketed with this Court within 60 days from the filing of the Appellant's notice of appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS, STATUTES

This appeal involves the following federal and state laws:

First Amendment, United States Constitution, as it relates to freedom of speech and association:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

Fourteenth Amendment, United States Constitution, to the extent it makes the First Amendment applicable to the states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 179.66, subd. 7 (1980):

> The employer shall not meet and negotiate or meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit or as provided for in section 179.69, subdivision 1.[1]

The foregoing sections and other relevant sections of PELRA are set forth in the Appendix at p. A-87.

---

[1] The Minnesota Legislature amended Minn. Stat. § 179.66, subd. 7 in 1982 by adding the following clause at the end of the existing language quoted above: "provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment." Minn. Laws 1982, ch. 568, § 2.

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of Minnesota's Public Employment Labor Relations Act, Minn. Stat. §§ 179.61-179.76 (1980). The primary issues ultimately considered by the District Court were: (1) whether it was constitutional, under the First and Fourteenth Amendments to the United States Constitution, for the MCCFA to act as the Appellees' exclusive representative pursuant to the collective bargaining provisions of PELRA; and (2) whether the meet and confer provisions of PELRA are constitutional on their face and as applied to Appellees under the First and Fourteenth Amendments. Memorandum Opinion and Order, Appendix at p. A-7. With regard to the first issue, the Court below upheld the constitutionality of state statutes establishing the use of exclusive representatives in collective bargaining and the constitutionality of the MCCFA serving as the exclusive representative. With regard to the second issue, the Court struck down on First and Fourteenth Amendment grounds the exclusivity of the exclusive representative in the meet and confer process set forth in section 179.66, subd. 7 and in sections of the collective bargaining agreement because of the resultant restrictions on the Appellees' access to the meet and confer process. It is the second issue which is the subject of this appeal by the MSBCC.

Appellant MSBCC is an agency of the State of Minnesota, and, under PELRA, is a "public employer" responsible for the management, jurisdiction and control of the state's community colleges. At the time of trial there were 18 community colleges in the State of Minnesota, each being a public two-year post-secondary educational institution. Appellees are faculty members at the community colleges and are, therefore, members of a bargaining unit under PELRA repre-

sented exclusively by the MCCFA. While Appellees are represented by the MCCFA, they are not members of the MCCFA.

PELRA imposes upon the public employer a duty to "meet and confer" with professional employees to discuss educational policies and other matters that are not terms and conditions of employment. Minn. Stat. §§ 179.66, subd. 3 and 179.63, subds. 15 and 18 (1980). The Minnesota Legislature recognized that professional employees could provide assistance to the public employer in making policy decisions and therefore it required this mutual exchange of ideas which is the essence of meet and confer. Minn. Stat. § 179.73, subd. 1 (1980). Nevertheless the administration retains its exclusive authority to make policy decisions. When the exclusive representative has been certified, the employer is not permitted to formally meet and confer with a member of the bargaining unit except through the exclusive representative. Minn. Stat. § 179.66, subd. 7 (1980). But informal communication with the administration by any faculty member outside of the meet and confer process is permitted regardless of his associational status.

The MCCFA and Appellant MSBCC have entered into biennial collective bargaining agreements since 1973. For present purposes, those agreements have been substantially identical in providing for meet and confer committees on both system-wide and individual campus levels.[2] The contracts have provided in pertinent part as follows:[3]

---

[2] The committees are called "exchange of views" committees at the local level and "meet and confer" committees on the system-wide level. The statute and the Court below referred to both levels of committees as "meet and confer." The term "meet and confer" shall similarly be used herein to describe committees on a campus as well as a system-wide level.

[3] All relevant sections of the Employment Contract between the MCCFA and MSBCC for 1981-1983 have been set forth in the Appendix at p. A-96.

ARTICLE I
RECOGNITION

The Employer recognizes the Association as the exclusive bargaining representative for all . . . employees of the designated bargaining unit.

The Employer will not during the life of this Contract meet and negotiate or meet and confer relative to terms and conditions of employment with any employee or group of employees who are covered by this Contract except through the exclusive bargaining representative. . . .

* * * *

ARTICLE VI

Section 6. *Association State Committee.* The State Association shall establish a committee of no more than eight members to meet and confer with the Minnesota State Community College Board for discussion and mutual exchange of ideas regarding statewide matters which are considered significant by the State Association or the Employer. The Employer shall provide the facilities and set the time for such conferences to take place, and such conferences shall be held at least three times a year. Agenda will be prepared and distributed one week in advance by the Board President or designee and will include all items submitted by the State Association. The agenda shall also include all items submitted by the Board President.

It has been the practice of the MCCFA to select only its members to serve on the faculty meet and confer committees.

The subjects considered at meet and confer sessions are those matters which are not terms and conditions of employ-

ment. Topics such as budgetary planning, new course proposals and other curriculum matters, degree requirements, student activity budgets, academic standards, and teacher evaluation have been subjects of meet and confer. Prior to the passage and implementation of PELRA, college policy matters were generally dealt with through college governance systems in which faculty members had an opportunity to participate.

PELRA is a result of the state's policy of promoting orderly and constructive relationships between all public employers and their employees. Minn. Stat. § 179.61 (1980). It provides for exchange of views through the exclusive representative. The Court below recognized that PELRA is a means by which the state can deal with its employees in a fair, efficient and peaceful manner. The Appellees stipulated and the Court found that creating a procedure of exclusive representation under PELRA furthers numerous state interests. Findings of Fact, Appendix at p. A-52. Included in the state's interests in a system of exclusive representation are avoidance of confusion, of conflicting demands, and of dissension which would result from more than one representative of the faculty, and maintenance of labor peace.

PELRA does not deprive non-members of MCCFA such as the Appellees of opportunities to speak freely and openly. While the formal meet and confer process provides a mechanism for mutual faculty-administration communication, all professional employees have the right to communicate their views to administrators and others outside of the meet and confer process.

In addition, PELRA neither mandates nor directs the process by which the persons on the committees are chosen. Nor does any community college administrator or MSBCC mem-

ber play a role in the selection of the members on the committees. There is no state statute or policy against including nonmembers of MCCFA on such committees.

In spite of the fact that the District Court recognized the state's interest in working through an exclusive representative and the opportunity available to all, including the Appellees, to speak as they wish, the Court found that the MCCFA's practice of excluding non-members from direct participation in the meet and confer process infringes on First and Fourteenth Amendment rights of the Appellees. However, the Court below recognized the state's interest in maintaining an orderly process for meeting and conferring with its employees. Therefore, the meet and confer process was declared valid so long as the state provides all faculty members with a fair opportunity to select and serve as committee members.

SUBSTANTIALITY OF QUESTION

On this issue of first impression the three-judge District Court (Judge Earl Larson dissenting) held "that when the state compels creation of a representative governance system in higher education and utilizes that forum for ongoing debate and resolution of virtually all issues outside the scope of collective bargaining, it must afford every faculty member a fair opportunity to participate in the selection of governance representatives." Memorandum Opinion and Order, Appendix at p. A-23. In reaching its decision on the meet and confer issues, the Court below, in effect, found that where a statutory meet and confer system is in effect, each faculty member of a public institution of higher education must be provided under the First and Fourteenth Amendments a right to par-

ticipate in the administration of that institution. The decision, if permitted to stand, creates new and wide ranging First Amendment rights for college faculty. These rights extend beyond anything previously recognized by this Court.

A. Faculty Members Of A Public Educational Institution Do Not Have A First Amendment Right To Meet And Confer With Their Employer Or Its Administrators.

In Minnesota under PELRA, a public employer such as the MSBCC is required to meet and confer with its professional employees. The faculty is thereby given an opportunity to enter into a dialogue with the administration on policy matters. This statutory right of faculty representatives to participate in administrative decision-making does not give rise to a First Amendment right of each faculty member to participate in that process. The constitutional and statutory rights are separate and distinct from one another. The former involves the right to speak, while the latter involves a mandated and structured dialogue or interaction between the parties.

This Court in *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979), addressed itself to the distinctions between the First Amendment right to speak and a statutory right obligating the employer to listen, respond, and consider:

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. . . . But the First Amendment does not impose any affirmative ob-

> ligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

441 U.S. at 465. *Accord, Henrico Professional Fire Fighters v. Board of Supervisors of Henrico County*, 649 F.2d 237 (4th Cir. 1981) and *Clifford v. Moritz*, 472 F. Supp. 1094 (S.D. Ohio 1979).

Thus, in analogous cases, there is no constitutional entitlement to force a public employer to sit down and exchange views on public policy with its employees. *See Hanover Township Federation of Teachers, Local 1954 v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972); *see Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D.Wis. 1974). The Court in the instant case failed to reconcile its decision on this issue with the existing body of cases tending to support the contrary conclusion. Since the First Amendment does not require the state to engage its employees in a dialogue, the fact that a dialogue is permitted by state law with some employees does not give the remaining employees a constitutional right to participate either directly or indirectly.

In ruling that PELRA's meet and confer process gives rise to a First Amendment right, the District Court did not cite any other court's decision. In fact, the Court completely ignored the weight of authority to the contrary. For example, while public employees have a First Amendment right to speak to the matters about which negotiations are concerned, there is no *constitutional* right to participate in the collective bargaining sessions. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *see City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). In fact, there is no constitutional right to engage in collective

bargaining at all. *Smith v. Arkansas State Highway Employees, Local 1315, supra*; *Hanover Township Federation of Teachers, Local 1954 v. Hanover Community School Corp., supra.*

In *Abood v. Detroit Board of Education, supra*, this Court considered a challenge by public school teachers on First and Fourteenth Amendment grounds to an agency shop arrangement authorized by a Michigan statute very similar to Minnesota's PELRA. This Court in *Abood* laid to rest any questions of the constitutionality of collective bargaining. The District Court affirmed the use of an exclusive representative under PELRA, holding that "*Abood* squarely upholds the constitutionality of exclusive representation bargaining in the public sector." Order, Appendix at p. A-4. In *Abood*, the apparent conflict between the employees' First Amendment rights and the statutorily imposed use of an exclusive agent in collective bargaining was resolved. This Court stated:

> A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint. Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing.

431 U.S. at 230.

In the instant case, the employer may similarly meet with the exclusive representative in the meet and confer sessions without violating an excluded faculty member's First Amendment rights so long as that employee is otherwise free to express his views, publicly or privately. The Court below found that the Appellees have the right to communicate freely and to express their individual views to their employer. Find-

ings of Fact, III, B. Appendix, at p. A-50. In addition, no restrictions limiting Appellees' access to administrators at MSBCC outside of meet and confer have been imposed by PELRA. *See* Minn. Stat. § 179.64, subd. 1 (1980). The Appellees' First Amendment rights as heretofore set out have been honored by the Appellant. But the District Court decision recognizes a new First Amendment right to participate in college administration which is contrary to prior decisions of this and other federal courts.

B. The First Amendment Does Not Require That An Academic Forum Be Provided For The Speech Interest Of Each College Faculty Member.

The District Court recognized that meet and confer sessions were not forums open to public participation but it still held that the Appellees were entitled to participate therein. Memorandum Opinion and Order, Appendix at p. A-22.

The limitation that the meet and confer sessions be conducted only through the exclusive representative demonstrates the intended creation of a non-public forum functioning as part of the formal relationship between employer and employee. Numerous provisions concerning meet and confer have been negotiated between the MCCFA and the State of Minnesota and are included in the Employment Contract, Appendix at p. A-96. This Court in *Abood v. Detroit Board of Education, supra* found no obligation on the part of the public employer to grant to the public employee access to the collective bargaining sessions established under Michigan labor relations law. *Abood* distinguished its approval of a system of exclusive representation from its holding in *City of Madison v. Wiscon-*

sin Employment Relations Commission, supra. In *City of Madison,* public employees, like other citizens, had the right to express their views at a public school board meeting. There the forum was open to the public and the public employee was given the same rights as any other citizen. In the present case, the forum is like the one in *Abood* in that it is not open to public participation and should not be open directly or indirectly to the Appellees.

A state has no obligation to create a forum for its employees to advocate their views. *Winston-Salem/Forsyth County Unit of North Carolina Association of Educators v. Phillips,* 381 F. Supp. 644 (M.D. No.Car. 1974). In that case, a teachers' organization in a public school challenged a state law voiding contracts between public employers and public employee unions. In reaching its decision that the constitution does not mandate that the government be compelled to talk to or contract with a labor association, the Court stated:

> While the First Amendment may protect the right of plaintiffs to associate and advocate, not all of their associational activities have the protection of that amendment. The state is not required to provide plaintiffs with a special forum in order to advocate their views.

Id. at 646. *Accord, Connecticut State Federation of Teachers v. Board of Education Members,* 538 F.2d 471 (2nd Cir. 1976). *See also, Reid v. Barrett,* 467 F. Supp. 124 (D.N.J. 1979). Similarly, on the campus of a post-secondary educational institution, the First Amendment does not require the creation of a public forum. *Widmar v. Vincent,* 102 S.Ct. 269 (1981).

The meet and confer sessions to which Appellees demanded access are statutorily established meetings in which only cer-

tain administrators and those representatives selected by the exclusive representative are permitted to engage in the mutual exchange of ideas. The forum is not one open to public participation. On the other hand, Appellees have available to them alternative opportunities for communication with the employer and its representatives. As long as these alternative methods are available and the desired forum is not public, the Appellees' First Amendment rights have been preserved. *Connecticut State Federation of Teachers v. Board of Education Members, supra.*

C. Speech Involved In Meet And Confer Sessions Is Not Included Under Principles Of Academic Freedom.

In reaching its decision below, the District Court panel expanded the scope of the First Amendment by equating faculty governance, i.e. the dialogue required under the meet and confer provisions, with the academic freedom traditionally afforded to teachers in their classrooms. While this Court has long supported the idea that teachers and their students "must always remain free to inquire, to study and to "evaluate", it has never extended the principles of academic freedom to encompass direct or indirect participation in the governance of the educational system itself. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Cases involving the issue of academic freedom highlight society's interest in encouraging an atmosphere of "speculation, experiment and creation." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). In an effort to preserve these time honored traditions, this Court has held that regulations and statutes proscribing utterances or acts of teachers and teacher candidates were violative of First Amendment rights, *Keyishian v. Board of*

Regents, 385 U.S. 589 (1967); that a statute requiring the filing of an affidavit listing names of associations to which each teacher belonged or contributed was an unconstitutional limitation of associational freedoms guaranteed by the constitution, *Shelton v. Tucker*, 364 U.S. 479 (1960); and that questions by an attorney general concerning the content of a professor's lectures and his knowledge of certain areas were an invasion of his academic freedom in the classroom, *Sweezy, supra*. In these three cases, which are typical of those in which academic freedom is an issue, the invalid act, regulation, or statute was viewed by the Court as an attempt by the government to directly impair the flow of ideas in the classroom.

The present matter does not involve the suppression of ideas in the classroom. In addition, the issue does not encompass the right of the teacher to speak freely. Faculty members at the community colleges have the right to speak freely on all issues. In fact, rather than having their speech restricted, the Court below found that Appellees have available other opportunities and forums for communicating with their employer and that they have utilized these opportunities. Findings of Fact, III. B., Appendix at p. A-50. It has been determined that "[t]he existence of reasonable alternative means of communication further eviscerates plaintiffs' theory . . ." that altering or removing a particular forum for speech violates the Constitution. *Reid v. Barrett, supra* at 128. *Accord, Connecticut State Federation of Teachers v. Board of Education, supra.*

This Court has defined the free speech rights of a public school teacher as being comparable to those rights enjoyed by any other citizen. Thus in the *City of Madison, supra*, the Court stated:

> We have held that teachers may not be "compelled to relinquish the First Amendment rights they would other-

> wise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."

429 U.S. at 175, citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Similarly, in *Abood v. Detroit Board of Education, supra*, this Court again equated the rights of public school teachers with those of non-public employees generally. There, plaintiffs, Michigan public school teachers, who were members of a bargaining unit represented exclusively by an employee organization, challenged a statutorily authorized agency shop provision of the collective bargaining agreement. The primary basis for the Michigan teachers' claims rested on their belief that the agency shop infringed on their First and Fourteenth Amendment interests. *Abood* affirmed a system of exclusive representation in the public educational institution. Citing its holding in *City of Madison, supra*, this Court recognized that a public employee may express his views and voice his concerns much the same as other citizens. But, the Court saw no abridgment of the teachers' academic freedom in the formalized procedures through which the exclusive representative spoke for the entire faculty. So too in the present case. There is no restriction on Appellees' academic freedom under the meet and confer process between the MSBCC and the MCCFA. The District Court's reliance on academic freedom as a basis for its decision is incorrect.

D. Restricting Meet And Confer Rights To The Exclusive Representative Serves A Significant Governmental Interest.

The three-judge District Court acknowledged that the state has numerous valid interests in pursuing the meet and confer process set forth in PELRA. Findings of Fact IV.C, Appendix at p. A-52. Consequently, the Court balanced the state's interest of making the meet and confer process an orderly one against what it found to be Appellees' First Amendment right to participate. In fact, since the Court recognized the strong state interest in an orderly process, it did not completely invalidate the meet and confer process. Instead, the Court invalidated the use of the exclusive representative, allowing the meet and confer process so long as all members of the bargaining unit are given an opportunity to select representatives.

Before balancing Appellees' First Amendment rights with the state's justification, Appellees must demonstrate that their First Amendment rights have indeed been infringed. *Connecticut State Federation of Teachers v. Board of Education, supra.* Such balancing is not necessary here since there are no First Amendment rights involved; however, even if Appellees have a constitutional right to participate indirectly in meet and confer with college administrators, the administration's interests in dealing with just the exclusive representative outweigh those rights. *See Abood v. Detroit Board of Education, supra*; *Connecticut State Federation of Teachers v. Board of Education, supra.*

As already discussed, the meet and confer process was initiated to provide state ofifcials with formal and continuing access to professional "knowledge, expertise, and dedication

which is helpful and necessary to the operation and quality of public service. . . ." Minn. Stat. § 179.73, subd. 1 (1980). However, as the District Court admitted, to require the Appellant to meet and confer with each individual faculty member would render the process confusing and unworkable. Consequently, PELRA provides that the professional employees select a representative to meet and confer with the public employer. Minn. Stat. §§ 179.73, subd. 2, 179.76, subd. 7 (1980). The employer's interest in meeting and conferring with an exclusive employee representative is similar in many respects to its interests in negotiating a collective bargaining agreement with an exclusive representative.

In addition, meeting and conferring with an exclusive representative results in less confusion and conflict than might arise if the Appellant were to meet individually with each faculty member or with rival unions, or a committee chosen by the entire faculty. Thus the legitimate interest in maintaining "labor peace" is accomplished through the meet and confer process. In affirming the legitimacy of governmental interests in dealing with an exclusive representative, the Court in *Abood v. Detroit Board of Education, supra,* stated:

> The governmental interests advanced by the agency-shop provision . . . are much the same as those promoted by similar provisions in federal labor law. The confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, . . . are no different in kind from the evils that the exclusivity rule in the Railroad Labor Act was designed to avoid . . . the desirability of labor peace is no less important in the public sector. . . .

(Citations omitted). *Id.* at 224. This interest in labor peace, an interest recognized and supported by the Courts, plainly supports the meet and confer process established by PELRA.

CONCLUSON

The decision of the Court below has the effect of undermining this Court's decision in *Abood v. Detroit Board of Education*, and *City of Madison v. Wisconsin Employment Relations Commission*. The holding of the Court below establishes a right which was not previously protected by the First Amendment; it affords public employees in the area of labor relations greater rights than non-public employees, contrary to *Abood*; it mandates responsibilities of the public employer that have not been previously imposed; and it gives faculty members in the community college system governance rights as a matter of constitutional right. For these reasons and for

the reasons stated above, the Minnesota State Board for Community Colleges requests that this Court note probable jurisdiction.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
DONALD J. MUETING
Counsel of Record
Special Assistant
Attorney General
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-3369
SHEILA S. FISHMAN
Special Assistant
Attorney General
1100 Bremer Tower
7th Place & Minnesota Street
St. Paul, Minnesota 55101
Telephone: (612) 296-3701
Attorneys for Appellant
Minnesota State Board for
Community Colleges

November 30, 1982